

From: ACUS Information nfo@acus.gov [REDACTED]
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To: [REDACTED]

From: Maran Vedamanikam [REDACTED]
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To: ACUS Information <info@acus.gov>
Cc: Maran Vedamanikam [REDACTED]; Alex Vedamanikam [REDACTED]; Joel Vedmanikam [REDACTED]
Subject: Small Claims Patent Court Comments: Issues associated with and options for designing a small claims patent court.
Importance: High

To whom it concerns,

The following is my comments that I fully support and agree with.

Most innovative inventions are invented and patented by small entities, and these inventions are most often infringed upon and massively commercialized by very large multinational corporations. This means that most small entities do not have small claims – they have huge claims.

For small entities, the cost and complexity of a patent lawsuit is an insurmountable barrier to defending their rights. The lack of money can cause a small entity to license a patent that they do not infringe just to stop the huge legal fees. But the size of a claim has no relationship to whether a small entity has millions of dollars to defend their patent rights.

When a patented invention of a small entity is infringed by a huge corporation, the infringers deep pockets, existing engineering, marketing and distribution capabilities massively commercialize the invention and take the market leaving the small entity unable to compete and out of business. Once out of business, the small entity cannot survive the eBay public interest test because they do not have a product on the market.

The patent protection that they worked so hard to obtain, the patent protection that was issued by the USPTO, is also patent protection that can be easily declared invalid at the USPTO's PTAB for reasons which were (or should have been) addressed during patent examination. Once issued, it should be protected.

The PTAB is an administrative tribunal in the Executive branch of government, not an Article III court. Yet, they take personal property rights without a jury and without due process of law.
The Focus Should be Small Entities, not Small Claims.

Patent infringement litigation is among the most expensive and complicated litigation

in the U.S. Teams of lawyers, mostly working for accused infringers, run costs into the millions of dollars. Often dozens of motions are filed that must be answered, and a single case can have several appeals to the Court of Appeals for the Federal Circuit (CAFC). Cases can take ten years to fully resolve.

Due to the high costs, extremely long pendency, and the high chance that the patents will be invalidated in the PTAB or as an abstract idea, and because injunctions are no longer available for most small entities, very few law firms will take a case on a contingent fee basis. This means that small entities need millions of dollars to defend their rights. Small entities, whether the patent holder or the accused infringer, cannot shoulder the financial burden.

The PTAB has failed small entities. PTAB reviews can add three or more years to litigation and add at least \$500,000 dollars of costs. Because there are no standing requirements, anyone can challenge a patent even if they will never be the subject of litigation. There are no limits to the number of PTAB reviews that can be filed. Many small entities have been overwhelmed by dozens of PTAB reviews filed by multiple huge corporations and their proxies.

Small entities often invent pioneering technologies. These inventions are knocked off by huge corporations that massively commercialize them and run the small entity out of business. This means that many small entities do not have small claims, but they still cannot afford the millions of dollars to defend their rights. Therefore, a small claims court is not a practical solution, and any new process must focus on the size of the entity rather than the size of the claim.

The infringer lobby has repeatedly pushed a narrative the small entities are the target of patent lawsuits. If this is indeed the case, then small entity defendants must also be considered in any solution. the PTAB's excessively high invalidation rates and their focus on invalidating small entity patents on the request of huge multinational corporations, administrative tribunals do not work.

The PTAB violates core Constitutional constructs of due process and separation of powers. An administrative tribunal cannot adjudicate patent litigation cases for the same reasons. That leaves Article III courts. However, as we have found in the CAFC, the concentration of adjudicative power in a few judges can lead to a dangerously unbalance court.

Over the years, a large number of anti-patent judges have been put on the CAFC. These judges have repeatedly and unfairly decided cases against small entities and in favor of huge multinational corporations.

The CAFC has demonstrated that it will override sound judges on venue transferring cases to the headquarters of the infringer. This practice will prohibitively raise costs for small entities because they will need to travel, take excessive time off work and hire local counsel in courtrooms often thousands of miles away. If a separate Article III court is created to hear small entity cases, those small entities not near that court will have the same disproportionate cost increase.

Small entities must be able to file lawsuits in the courthouse nearest to them.

The solution is to create small entity rules in the Federal Rules of Civil Procedure (FRCP) that Article III courts must follow upon request by either party if that party is a small entity. This allows a small entity to file suit in the federal district court most convenient to the small entity.

To qualify as small entity, the individual or business' revenue must be no more than 500MM and 499 employees.
Upon request by either party, the small entity FRCP rules must be followed by the Article III court.

Excessive motion practice is common in patent cases. Largely this practice is intended to drive up costs for the party least able to afford the cost increase. Therefore, limiting the number of motions each party can file is important. Limiting the number of motions forces each party to consider the importance of the motions so that it files only those motions that have a material effect on the adjudication of the case. Frivolous motions are avoided by this limit.

PTAB reviews must be optional for small entity patent holders. If the PTAB becomes a fair solution, many will accept the PTAB to adjudicate validity. If it remains as it is now (corrupt) many will not accept a PTAB review.

Injunctive relief drives settlements. As a case moves to its final trial date, each party learns the risks related to infringement and validity. In nearly all cases, when the parties are anticipating an injunction, a settlement occurs before trial. This will increase the opportunity of settlement prior to trial thereby eliminating the costs of trial.

Injunctive relief brings a market value for the infringement because damages would be negotiated in a free market by willing buyer and a willing seller.

In cases where the practical life on the patents do not allow for injunctive relief or in cases where the patent holder does not request injunctive relief, disgorgement of all profits must be the remedy for past infringement and rules of thumb should be established for ongoing licensing fees.

Reestablishment of injunctive relief not only keeps with the Constitution's construction of a patent solely as an "exclusive Right", but it also eliminates all the costs incurred by litigating damages, which can match or exceed infringement litigation and are impossible for small entities to afford.

The above is my views as a patent holder and these are my comments as well.

Sincerely
Maran Vedamanikam

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Maran Vedamanikam



Main: (505) 797-3042

[REDACTED]
Fax: (505) 338-4864

www.Euroclydon.com

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